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IN THE COURT OF APPEALS OF INDIANA

RAYMOND WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-774
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0602-FC-51252

June 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Raymond Williams appeals his conviction for Class C felony carrying a handgun without a license. We affirm.

Issues

Williams raises two issues, which we reorder and restate as:

I. whether the trial court properly denied his motion to suppress evidence obtained during a stop of the car in which Williams was riding; and

II. whether an investigating officer's trial testimony violated Williams's Sixth Amendment right to confront witnesses.

Facts

On March 1, 2006, Anna Rhodes called her sister, Monisha, who had borrowed Anna's silver Pontiac Grand Am earlier that day. Anna instructed Monisha to pick her up. Shortly thereafter, Monisha, Anna, Marquida Holland, Anna's young child, and Williams drove to an apartment complex in Indianapolis so that Anna could confront Doshona Bryant about an alleged sexual relationship with Williams.

During the confrontation, three shots were fired, apparently into the air, and the police were called. It was reported that the group left in a silver four-door Pontiac. Officer Earl Graybeal of the Indianapolis Police Department observed a car matching that description in the vicinity of the apartment complex. Officer Graybeal stopped the car and eventually conducted a search of it. He discovered a handgun under the seat near where Williams had been sitting. After being Mirandized, Williams stated the gun was his.

On March 20, 2006, the State charged Williams with Class A misdemeanor carrying a handgun without a license and Class C felony carrying a handgun without a license. On April 10, 2006, Williams moved to suppress evidence obtained during the search of the vehicle. In the motion, Williams requested that the trial court enter findings of fact and conclusions of law. After a hearing, the trial court denied the motion to suppress without issuing findings and conclusions. On July 20, 2006, a jury trial was held, and Williams was found guilty as charged. Williams now appeals.

Analysis

I. Motion to Suppress

Prior to trial, Williams filed a motion to suppress the gun discovered during a search of Anna's car and Williams's statement that the gun belonged to him. Williams first argues that the trial court improperly failed to enter findings of fact and conclusions of law explaining the denial of his motion to suppress despite his request that it do so. Indiana Trial Rule 52(A) applies to "issues tried upon the facts without a jury" and provides, "Findings of fact are unnecessary on decision of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(B) (dismissal) and 59(J) (motion to correct errors)." Contrary to Williams's assertions, Indiana Trial Rule 52(A) does not require a trial court to issues findings and conclusions in denying his motion to suppress because it was not a trial or hearing that produced a final decision. See Cochran v. State, 843 N.E.2d 980, 982-83 (Ind. Ct. App. 2006) ("A ruling upon a pretrial motion to suppress is not intended to serve as the final determination of admissibility because it was subject to modification at trial."), trans. denied, cert. denied 127 S. Ct. 943. It was not

until the trial court ruled on the objection at trial that its determination regarding the admissibility of the evidence was final. See Kelley v. State, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005) ("[T]he preliminary ruling on the defendant's motion to suppress is subject to modification at trial."). Further, because the motion to suppress was not made pursuant to Indiana Trial Rule 41(B) or 59(J), Indiana Trial 52(A) specifically provides that the issuance of findings and conclusions is "unnecessary." Williams has not established that findings and conclusions supporting the trial court's preliminary ruling on the admissibility of evidence were required.

Williams also argues that he was improperly "denied the opportunity to even ascertain if new matter [sic] should be considered as well as the opportunity to present it or even describe it." Appellant's Br. p. 12. The record simply does not support this assertion. At the beginning of the trial, defense counsel stated that the trial court had not entered findings and conclusions relating to the denial of the motion to suppress and requested:

> So I am going to ask the Court to give me leave to at least argue it in front of this Court again, given that I didn't get the findings of fact and rulings of law for the basis of the ruling. I would keep it as brief as possible, your Honor.

Tr. p. 175. Later, defense counsel objected to Officer Graybeal's testimony regarding finding a gun in the car. Prior to ruling on the objection, the following exchange took place between defense counsel and the trial court:

> Ms. Lane: Your Honor, I would ask the Court at this time to remove the jury so I can argue my - - argue my motion.
>
> The Court: What motion?

Ms. Lane: On the - - object to the testimony and argue my Motion to Suppress outside the presence of the jury.

The Court: Okay. You had your Motion to Suppress already; correct?

Ms. Lane: Yes, ma'am.

The Court: And you had your ruling.

Ms. Lane: Yes.

The Court: Okay. What's left to argue?

Ms. Lane: Your Honor, based on the - - the ruling was just denied. It wasn't explained why it was denied. So I am asking the Court for an opportunity to argue it for a fresh ruling - -

The Court: Okay. When the - -

Ms. Lane: - - or reconsideration by the Court.

The Court: The commissioner's ruling is adopted by the presiding judge and remains denied.

Ms. Lane: Okay. Then I would just - -

The Court: You want to preserve your record - -

Ms. Lane: Yes.

The Court: - - on that, though; right?

Ms. Lane: Yes.

The Court: All right.

Tr. pp. 246-47. Defense counsel did not attempt to make new legal or factual arguments during this exchange, and we are not convinced that Williams was improperly denied the

opportunity to do so. Without more, Williams has not established that reversal is required.

As to the merits of his claim that evidence obtained during the stop was improperly admitted, Williams has also failed to establish error. Although Williams originally challenged the admissibility of the evidence through a motion to suppress, he appeals following a completed trial. Therefore, the issue is framed as whether the trial court abused its discretion by admitting the evidence at trial. Widduck v. State, 861 N.E.2d 1267, 1269 (Ind. Ct. App. 2007). "Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection." Id. "We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling." Id. Unlike an ordinary sufficiency of the evidence case, however, we must also consider any uncontested evidence favorable to the defendant. Id.

Williams first argues that there was no probable cause to support the investigatory stop of Anna's car because the information on which the stop was based had no indicia of reliability. He cites to Johnson v. State, 659 N.E.2d 116 (Ind. 1995) in support of this argument. Johnson involved an investigatory stop based on a tip from a confidential informant who said nothing that was not easily knowable by many members of the general public and who had not previously provided reliable tips. Johnson, 659 N.E.2d at 119. Our supreme court concluded, "the tip in this case was completely lacking in indicia of reliability and the record offers no evidence that the confidential informant was reliable; the tip was, therefore, inadequate to support an investigatory stop." Id.

Johnson is inapposite to these facts. Here, the police responded immediately to several 911 calls indicating there had been a fight and shots fired. Bryant and other callers reported the incident to 911 operators and Officer Widmer confirmed the description of the incident when he arrived at the scene. Officer Graybeal used that information to conduct an investigatory stop of a vehicle matching that description approximately three-quarters of a mile from the apartment complex. Our supreme court specifically anticipated such an investigatory stop in Johnson when it observed, "But in some situations-for example, when the victim of a crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime-the subtleties of the hearsay rule should not thwart an appropriate police response." Id. Even if there was confusion at the scene when Officer Widmer arrived and Bryant had just had a "very contentious" argument with Williams, those who reported the details of the incident were seeking immediate police assistance after shots were fired. Appellant's Br. p. 13. Further, this is not a case involving an anonymous caller as Williams asserts. Williams has not established that the investigatory stop was improper.[1]

Williams also contends that when he was removed from the car and handcuffed before the car was searched, there was no probable cause for his detention and that the "ensuing interrogation, even if Miranda rights were given, was conducted so as to exploit

[1] Williams makes no specific argument, independent from his argument challenging the stop, that the search of the vehicle was improper under the Fourth Amendment. His failure to do so waives the issue. See Ind. Appellate Rule 46(A)(8).

his illegal arrest." Appellant's Br. p. 15. Officer Graybeal testified that after he initiated the traffic stop, he explained to the driver the purpose of the stop and asked the occupants of the car to keep their hands where he could see them "because of the nature of the run." Tr. p. 238. Officer Graybeal testified that despite his repeated requests, Williams would put his hands up momentarily and drop them down between his legs again. Because Williams continued to move his hands, Graybeal took him out of the car and placed him in handcuffs. Officer Graybeal testified, "If he had a gun on him or within reach, I didn't want him to be able to grab it, to be able to shoot me, himself, or a member of the general public." Tr. p. 240. When other officers arrived at the scene, the remaining passengers were removed from the car and the car was searched. After the officers found the handgun, Williams was Mirandized and Williams claimed the gun was his and that no one else knew about it.

As we explained in Wright v. State, 766 N.E.2d 1223, 1232 (Ind. Ct. App. 2002):

> according to Terry v. Ohio, the Fourth Amendment to the U.S. Constitution permits a police officer to expand his routine weapons inquiry and conduct a warrantless search for weapons for the officer's own safety. Terry v. Ohio, 392 U.S. 1, 26, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (as cited in Burkett, 691 N.E.2d at 1244). The purpose of this search is to allow the officer to pursue his investigation without fear for his safety or the safety of others. Joe, 693 N.E.2d at 575. The officer need not be absolutely certain that the individual is armed, but only that a reasonably prudent person in the same circumstances would be warranted in the belief that his safety or that of another was in danger. Id. In determining whether the officer acted reasonably under the circumstances, due weight must be given, not to the officer's inchoate and unparticularized suspicions, but to the specific reasonable inferences that the officer is entitled to draw from the facts in light of his experience. Id.

Williams's contention is similar to that made by Wright who argued that when the arresting officer "handcuffed Wright, he placed him under arrest, requiring Officer Lehman to have probable cause to conduct a search." Wright, 766 N.E.2d at 1232. We determined that although Wright was in custody at the time he was handcuffed and patted down, probable cause was not required. Id. at 1232-33. We observed:

> Moreover, although we have not had an opportunity to do so, the Seventh Circuit, along with other states that have addressed this exact issue, have determined, that after considering all of the surrounding circumstances the mere use of handcuffs does not convert a Terry stop into a full arrest so as to require probable cause. Given the fact that Wright began "feeling his pockets" immediately after being asked if there were "any guns or anything illegal in the vehicle," it was not unreasonable for Officer Lehman to handcuff Wright while conducting his pat down search for his own personal safety.

Id. at 1233 (citations omitted).

Here, Officer Graybeal stopped Anna's car approximately three-quarters of a mile from where an incident involving gunshots was reported to 911 by three callers and the report of which was confirmed by Officer Widmer. Anna's car met the description of a silver four-door Pontiac with five passengers. Moreover, Williams refused to keep his hands where Officer Graybeal could see them despite being ordered to do so. Given these circumstances, Officer Graybeal acted reasonably when he removed Williams from the car and placed him in handcuffs for officer safety. Although Williams may have been in custody at the time he was handcuffed for officer safety, he was not placed under arrest until later. Officer Graybeal did not need to have probable cause to place Williams in

handcuffs. Williams has not established that his statements to police officers were made after an illegal arrest.

Williams also argues that the search and seizure were improper under Article I, Section 11 of the Indiana Constitution. "The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances." Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). "[T]he totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure." Id. at 360.

Under these facts, we believe the stop and search were reasonable. Although the police officers' actions were fairly intrusive, they were investigating allegations that involved gunshots. Williams's failure to follow Officer Graybeal's directions added to Officer Graybeal's concern for his safety. The stop was based on the 911 dispatch and Officer Widmer's confirmation of the account. The car matched their description of a silver four-door Pontiac and was stopped within minutes of the dispatch near the apartment complex where the incident occurred. Office Graybeal had a specific basis for selecting the vehicle in which Williams was riding. Williams has not established that his rights under the Indiana Constitution were violated**.**

II. Sixth Amendment

Williams argues that the testimony of investigating Officer, Jeffrey Widmer, regarding what a witness told him about the incident when he arrived on the scene, was testimonial hearsay admitted in violation of his Sixth Amendment right to confront

witnesses. Williams complains specifically of the testimony relating that "a male got out of a car and fired shots and then left." Appellant's Br. p. 7.

"The Confrontation Clause of the Sixth Amendment provides: 'In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" Davis v. Washington, -- U.S. --, 126 S. Ct. 2266, 2273 (2006). In Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004), the Supreme Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." In determining what constitutes a "testimonial statement," the Supreme Court has explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, -- U.S. at --, 126 S. Ct. at 2273-74. The Davis court concluded that when a 911 call produces a statement in which the caller is not testifying but is acting as a witness and enabling police assistance to meet an ongoing emergency, the statements are not testimonial. Id. at --, 126 S. Ct. at 2277.

Here, Widmer testified over Williams's objection that when he arrived at the scene, Bryant stated that a "male got out, fired, turned -- he got out of the car, turned around, fired shots at the car, and then got back in the car, and they left." Tr. pp. 199-00.

Williams also testified that Bryant described the car as "a four-door car, silver in color. And she stated it was possibly a Pontiac."[2] Id. at 200. She also indicated where the car was by pointing to it through a "thicket of trees." Id. at 200-01.

The State contends that Bryant's statements were non-testimonial "because they were made to enable to [sic] officer to respond to an ongoing emergency, i.e., the apprehension of the fleeing car." Appellee's Br. p. 6. We believe the State's argument would allow the on-going emergency exception explained in Davis to swallow the rule. The Supreme Court was clear that where statements are deliberately recounted, in response to police questioning, about how potentially criminal past events began and progressed and take place some time after the events described were over, such statements are "inherently testimonial" because they do precisely what a witness does on direct examination and are an obvious substitute for live testimony. Davis, -- U.S. at --, 126 S. Ct. at 2278. The Supreme Court also rejected the argument that initial inquiries by police officers are nontestimonial. The Court observed that where statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." Id. at --, 126 S. Ct. at 2279.

Because Williams had gotten back into the car and had driven away at the time Bryant made the statements to the police we do not believe the emergency was still

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[2] It is unclear whether Bryant's recount of the incident was prompted by police questioning or offered spontaneously. For argument's sake, we will assume that all of Bryant's statements were made in response to police questioning.

ongoing. Accordingly, Widmer's recount of Bryant's statements was admitted in violation of Williams's Sixth Amendment right to confront witnesses. Nevertheless, we believe the admission of this evidence was harmless beyond a reasonable doubt.

"A federal constitutional error is harmless if it is clear beyond a reasonable doubt that it did not affect the judgment." Pope v. State, 853 N.E.2d 970, 973 (Ind. Ct. App. 2006). During the cross-examination of Office Widmer, defense counsel offered into evidence several 911 calls.

In the first call, Bryant stated that "some chick came out and tried to fight her." Exhibit B. She also stated that they were shooting. During the call she stated that they just left in a grey car with four doors. The next caller was a man who stated that there was a group of teenagers fighting and that a black male in a red hooded sweatshirt had fired a shot. This caller was clearly relaying events as they happened and repeatedly asked the 911 operator to send the police. Thus, the information in the 911 calls was merely cumulative of Officer Widmer's testimony regarding what Bryant told him when he arrived on the scene.

Further supporting our conclusion that Officer Widmer's testimony was harmless is Williams's statement to police that the gun belonged to him. Accordingly, we can say that the admission of this testimony was harmless beyond a reasonable doubt.

Conclusion

The trial court properly denied Williams's motion to suppress, and any error in Officer Widmer's testimony regarding Bryant's statements to him was harmless. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.